DEC 2 1940
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 604

UNITED STATES NATIONAL BANK OF SAN DIEGO, A NATIONAL BANKING ASSOCIATION, FIRST NATIONAL TRUST & SAVINGS BANK OF SAN DIEGO, A NATIONAL BANKING ASSOCIATION, AND EMIL KLICKA,

Petitioners,

vs.

COUNTY OF SAN DIEGO, A QUASI MUNICIPAL CORPORATION, AND CROWELL D. EDDY, AS ASSESSOR OF SAN DIEGO COUNTY.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND SUPPORTING BRIEF.

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Of Counsel.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

MAY IT PLEASE THE COURT:

United States National Bank of San Diego, a national banking association, First National Trust & Savings Bank of San Diego, a national banking association, and Emil Klicka pray that a writ of certiorari issue to review the final judgment of the Supreme Court of the State of California, (the highest court of the State in which a decision of the

suit or of the Federal question could be had [1]), entered on September 25, 1940 (R. 166). Said final judgment reversed a judgment of the Superior Court of the State of California, in and for the County of San Diego (R. 26-27), in favor of petitioners and their co-plaintiffs, enjoining the defendants from assessing for purposes of local taxation certain banking equipment owned and used by petitioners and by Bank of America National Trust and Savings Association, respectively, in the conduct of their business of banking, and consisting of vault doors, marble and bronze decorations, air conditioning systems, heating and ventilating systems, steel grille work and other like articles (all of which had been found and adjudged by the trial court to be personal property for purposes of taxation (R. 24), and are referred to hereinafter as "banking equipment"); and directed the trial court to enter judgment against the plaintiffs (including petitioners) (R. 162).

Opinions Below.

The opinion of the District Court of Appeal of the State of California (not officially reported), is reported in 96 P. (2d) 137.[2] The opinions of the California Supreme Court (R. 153-166), not yet officially reported, are reported in 105 P. (2d) 94.

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[1] California Constitution, Art. VI, §§ 1, 4, 4c. (Calif. Stat., 1929, pp. XX-XXIV.) *Atherton* v. *Fowler*, 91 U. S. 143, 146-8; *Van Huffel* v. *Harkelrode*, 284 U. S. 225, 230; *Hodges* v. *Snyder*, 261 U. S. 600, 601; *Rio Grande, etc., Ry. Co.* v. *Stingham*, 239 U. S. 44, 45-48.

[2] This opinion is not included in the transcript because it is deemed to be wholly immaterial herein for two reasons, namely:

(a) The decision of the District Court of Appeal affirmed the judgment of the trial court solely upon the basis of the local law of California, and, therefore, did not determine or discuss the Federal question;

(b) Before that decision became final, it was vacated and set aside by order of the California Supreme Court (R. 152).

Jurisdiction.

The judgment of the California Supreme Court was entered September 25, 1940 (R. 166). The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 937.

A right and immunity was specially claimed by petitioners under the Constitution and under a statute of the United States. Petitioners claimed immunity under and by virtue of the provisions of the Federal Constitution and the provisions of R. S. 5219, from direct taxation by the State upon the said articles of banking equipment.

This claim was denied by the California Supreme Court (R. 161-162).

There is drawn in question herein the validity of a statute of the State of California, to wit, the Bank and Corporation Franchise Tax Act (Calif. Stat. 1929, p. 19; amended, Calif. Stat. 1933, pp. 869, 870), as construed and applied herein by the California Supreme Court, on the ground of its being repugnant to the provisions of the Federal Constitution and to the provisions of R. S. 5219.[3]

Questions Presented.

1. Whether such articles of banking equipment, when owned and used in the conduct of their business by national banks are to be classified for purposes of local State taxation as personal property, or as "real property," within the meaning of that phrase as used by Congress in R. S. 5219.

2. Whether a State can empower itself to tax the personal property of national banks, without the consent of Congress, by enacting statutory definitions which purport to define such personal property as "real property".

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[3] See statement under heading "The Federal Question", *infra*, pp. 7-10.

3. Whether the provisions of the California Bank and Corporation Franchise Tax Act (*infra*, pp. 5, 24), as construed and applied by the court below, are constitutionally valid.

Statutes Involved.

The pertinent provisions of R. S. 5219; U. S. C. Title 12, § 548, as amended in 1923 and in 1926 (Mar. 4, 1923, c. 267, 42 Stat. 1499; Mar. 25, 1926, c. 88, 44 Stat. 223), are as follows:

> "The legislature of each state may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several states may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:
>
> 1. (a) The imposition by any state of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.
>
> * * * * * * *
>
> 3. Nothing herein shall be construed to exempt the real property of associations from taxation in any state or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed."

The pertinent provisions of the California Constitution are as follows:

> "Article XIII, section 16. (a) Banks, including national banking associations, located within the limits of this state, shall annually pay to the state a tax according to or measured by their net income, which shall

be in lieu of all other taxes and licenses, state, county and municipal, upon such banks, or the shares thereof, except taxes upon their real property, at the rate to be provided by law.

(b) The Legislature may provide by law for any other form of taxation now or hereafter permitted by the Congress of the United States respecting national banking associations; *provided* that such form of taxation shall apply to all banks located within the limits of this state. * * *"

(As amended June 27, 1933. Calif. Stat. 1935, pp. LXIX, LXX.)

The pertinent provisions of the California Bank and Corporation Franchise Tax Act (Calif. Stat. 1929, p. 19; Amended by Stat. 1933, pp. 869, 870), are as follows:

"§ 1. Every national banking association located within the limits of this state, shall annually pay to the state a tax according to or measured by its net income, to be computed, in the manner hereinafter provided, upon the basis of its net income for the next preceding fiscal or calendar year at the rate provided for in section 4a hereof. The state is hereby adopting the method numbered 4 authorized by the act of March 25, 1926, amending section 5219 of the Revised Statutes of the United States.

* * * * * * *

"§ 3. The tax referred to in sections 1 and 2 hereof shall be in lieu of all other taxes and licenses, state, county and municipal, upon the banks and banking associations therein mentioned, except taxes upon their real property." (Calif. Stat. 1933, pp. 869, 870.)

Statement.

In April, 1938, petitioners (together with two State banks who joined them as co-plaintiffs) filed suit in the Superior

Court of the State of California in and for the County of San Diego, against said county and its county assessor, seeking an injunction to restrain them from assessing as real property, for purposes of local taxation, the personal property owned by the national bank plaintiffs and by Bank of America National Trust and Savings Association, respectively, consisting of said articles of banking equipment (R. 1-6).

Petitioner Emil Klicka is the owner of the land and building occupied and used in its banking business by Bank of America National Trust and Savings Association, a national banking association, as lessee (R. 1, 133). The vault doors and other banking equipment therein are owned by the bank and were installed by it, with the right reserved to remove same at the termination of the lease (R. 135-136). If such equipment is assessed as "real property," the assessment will be a lien upon the real property owned by petitioner Klicka (R. 134-135; Calif. Political Code, §3718.)

Issues were joined by an answer filed in behalf of both defendants (R. 6-20). Trial of the issues was duly had, at which both parties produced all of their evidence, oral and documentary (R. 23, 29-143). The parties stipulated that for the purposes of the trial the vaults (but not the vault doors) "may be considered as real property" (R. 143). They also stipulated in respect of the other items of banking equipment (other than vaults and elevators not involved herein) "that their manner of affixation being substantially the same as the vault doors, that the decision of the Court on the vault doors will also govern as to them" (R. 30-31).

At the conclusion of the trial, the trial court found as a fact and adjudged:

> "That the vault doors, including the steel frames or casements thereof, and all vault appurtenances thereto,

marble and bronze decorations, air conditioning systems, heating and ventilating systems, steel grille work and all other articles of banking equipment owned and used by plaintiff banking corporation, excepting only the articles herein found to be real property,[4] are all personal property for purposes of local taxation'' (R. 24).

Judgment was rendered and entered, permanently enjoining the defendants from assessing or attempting to collect taxes upon said articles of banking equipment (R. 26-27).

The defendants appealed to the District Court of Appeal of the State of California (R. 28). That court rendered and filed its decision, affirming in all respects the judgment of the trial court in favor of the plaintiffs (petitioners herein), but without discussing the Federal question. (96 P. (2d) 137. See footnote 2 at p. 2, *supra.*) Thereupon the defendants-appellants petitioned for a hearing by the California Supreme Court which was granted; the decision was vacated and the cause transferred to said Supreme Court for hearing and decision (R. 152).

August 26, 1940, said Supreme Court rendered and filed its decision and judgment (by a bare majority), reversing in toto the judgment of the trial court (R. 162). Thereupon the plaintiffs (including petitioners) within the time allowed therefor by the rules of said court, and before the issuance of the remittitur (R. 168) duly petitioned said court to grant a rehearing of said cause (R. 168). Said petition was denied by order entered September 25, 1940, and said judgment thereupon became final (R. 166, 167).

The Federal Question.

The California Supreme Court actually entertained and decided the Federal question adversely to the right and

[4] The articles therein found to be real property were the vaults, per stipulation, and the elevator not involved herein (R. 23, 24).

immunity asserted. *Indiana ex rel Anderson* v. *Brand*, 303 U. S. 95, 98. In the majority opinion they said:

> "The defendants contend that since the Constitution of the United States and the federal statutes prohibit a state from assessing the personal property of a national bank, that an assessment such as here contemplated by the defendants would deprive national banks of a substantive right guaranteed to them by the provisions of the Constitution and federal statutes. They refer to section 5219 of the Revised Statutes (U. S. C. A., sec. 548 of title 12) which grants a state permission to tax only the shares of stock and real property of national banks. The cases cited by the defendants as determining that furniture and other personal assets are exempt from state taxation are cases where the character of the property was not in question and hence are not helpful in the determination of the case at bar.
>
> "The fact that under the rules and regulations of the controller of the currency, national banks must from time to time furnish to said controller, and publish at regular intervals, a sworn statement of their assets and liabilities and in this statement to segregate the real estate and personal property owned by them, and that in such classifications they list vaults and vault doors as personal property, has no bearing on the character of said property for purposes of taxation. There is no indication that said classification was made for purposes of taxation, nor with the intent to establish the legal status of vaults and vault doors as realty or personalty" (R. 161-162).

The denial of this claimed Federal immunity was necessary to the determination of the case against petitioners.

Mr. Justice Edmonds, in his dissenting opinion, discussed the Federal question as follows:

> "Moreover, so far as the respondent national banks are concerned, this is a case 'arising under the Constitution and laws of the United States'; in such a case the federal statutes are paramount, and the relevant deci-

sions of the federal courts construing and applying those statutes are controlling upon the courts of this state. This is because national banks are immune from state taxation, except in the manner and to the extent that such taxation is authorized by congress. The sole congressional authorization for state taxation of national banks is contained is Revised Statutes 5219 (12 U. S. C. A. 548) which authorizes taxation of their real property. This grant from the national government to the states, of permission to tax the real property of national banks, must be strictly construed against the grantee, as are all grants from a sovereign. (23 Cal. Jur. 804.) It follows that a state which imposes a tax upon property of a national bank must bring itself within the boundaries of this narrow and strictly limited congressional permission.

"For these reasons I am of the opinion that the judgment of the trial court should be affirmed" (R. 166).

The Federal question had been raised in every one of the briefs filed in behalf of petitioners in connection with the appeal, both in said District Court of Appeal and in said Supreme Court, and had been urged at the oral argument in each of said courts.

It was raised in the trial court in connection with the testimony of the witness, Pfanstiel (R. 52); the testimony of the witness, Wilson (R. 57); the testimony of the witness, Morrison (R. 121-122), and the introduction in evidence of plaintiff's Exhibit 7 (R. 122). The trial court took cognizance of the Federal question, and at the conclusion of the trial the trial judge asked counsel whether they agreed that he might take judicial notice "of the rules and regulations issued by the Controller of the Currency of the United States," and they so stipulated (R. 143). He also referred thereto in his "oral decision" at the conclusion of the trial. He said:

"I have checked through the National Banking Act and in checking through the index I do not find a similar

provision. [similar to sections 61 and 84 of the California Bank Act.] I do know—it is in evidence here, of course—that they require in setting up their corporate structure of liabilities and assets that the vaults and vault doors shall be carried as personal property * * * " (R. 145).

Specification of Errors to be Urged.

The California Supreme Court erred:

1. In holding that the articles of banking equipment involved herein (when owned and used in their business by national banks) are "real property" for purposes of State taxation.

2. In not holding that said articles, when so owned and used, are personal property and therefore exempt from direct State taxation.

3. In holding that the meaning of the phrase "real property," as used by Congress in R. S. 5219, is governed and controlled in its application to the property of national banks, by the statutory definitions contained in the statutes of California (R. 156).

4. In refusing to take cognizance of or give effect to the several congressional enactments in *pari materia* with R. S. 5219 which disclose and clarify the meaning of the phrase "real property," as used in the latter statute. (See pp. 17-18, *infra.*)

5. In refusing to give effect to the fact that when Congress reenacted R. S. 5219, in 1923 and again in 1926, the Treasury Department of the United States had adopted and followed a uniform practice whereby they placed a practical construction upon the phrase "real property" (in its application to national banks) as not including banking equipment of the kinds involved herein.

6. In refusing to take cognizance of or give effect to the settled rule of law that a grant of power or authority from the Government must be construed strictly against the grantee and in favor of the grantor.

7. In refusing to take cognizance of or give effect to the settled rule of law that statutes imposing taxes *in invitum* must be construed strictly against the State and liberally in favor of the taxpayer.

8. In holding that the State tax statute, as construed and applied by it, is constitutionally valid.

Reasons for Granting the Writ.

1. The State court has decided a Federal question of substance not heretofore determined directly by this Court, and has decided it in a way that is believed to be not in accord with applicable decisions of this Court.

2. It has decided said question adversely to the right and immunity asserted by petitioners under the Constitution and laws of the United States.

3. The question is one of great public importance in that it involves the extent and limitations of the power of the several States to impose tax burdens upon the national banks, which are fiscal agencies of the Federal Government. The importance of these agencies in the fiscal operations of the Government is greater today than ever before. Their continued existence, solvency and financial strength are indispensable to the fiscal operations of the Government as presently conducted.

4. The decision below, in holding that the meaning of the phrase "real property," in R. S. 5219, is controlled by the California statutory definitions, is erroneous; and is in conflict with applicable decisions of this Court. *Morgan* v. *Commissioner*, 309 U. S. —, 84 L. Ed. 369, 370.

5. The decision below, in refusing to give effect to the several Congressional enactments in *pari materia* with R. S. 5219, is erroneous, and is in conflict with applicable decisions of this Court. *Richardson* v. *Harmon,* 222 U. S. 96, 103; *Hamilton* v. *Rathbone,* 175 U. S. 414, 419-421.

6. The decision below is erroneous and is in conflict with applicable decisions of this Court, in that it violates the rule that a grant of power or authority from the Government must be strictly construed against the grantee and in favor of the grantor. *Coosaw Mining Co.* v. *State of South Carolina,* 144 U. S. 550, 562; *Stein* v. *Bienville Water Supply Co.,* 141 U. S. 67, 80, 81; *Chenango Bridge Co.* v. *Binghamton Bridge Co.,* 3 Wall. (70 U. S.) 51, 75; *Detroit, etc., Co.* v. *Detroit Railway,* 171 U. S. 48, 53.

7. The decision below is erroneous and is in conflict with applicable decisions of this Court in that it violates the rule that statutes imposing taxes *in invitum* must be construed strictly against the taxing authority and liberally in favor of the taxpayer. *Hecht* v. *Malley,* 265 U. S. 144, 156; *Gould* v. *Gould,* 245 U. S. 151, 153; *United States* v. *Merriam,* 263 U. S. 179, 187, 188; *Crooks* v. *Harrelson,* 282 U. S. 55, 61.

BRIEF.

Summary of Argument.

1. States have no power to tax national banks except in the manner and to the extent authorized by Congress. The Congressional grant of authority, R. S. 5219, does not authorize State taxation of any property of national banks except their "real property."

2. The determinative question, therefore, is: What did Congress mean by the phrase, "real property", as used in R. S. 5219? Upon this question, statutory definitions in State statutes are incompetent and immaterial.

3. Other Congressional enactments in *pari materia* with R. S. 5219, and contemporaneous with the reenactments thereof, show that Congress did not intend that the phrase "real property", as used therein, should include banking fixtures or equipment.

4. Congress, in reenacting R. S. 5219, in 1923 and in 1926, adopted the construction of the phrase "real property" which had been placed thereon by the Executive Department, as not including banking fixtures or equipment.

5. R. S. 5219, being a grant from the sovereign of power or authority, should have been construed strictly against the grantee and in favor of the grantor.

6. R. S. 5219, being a grant of authority to impose State taxes upon national banks *in invitum*, should have been construed strictly against the State and liberally in favor of the taxpayer.

6-a. Apart from the rules of strict construction, the banking fixtures involved herein are personal property under the common law rules governing trade fixtures.

7. The State tax statute, as construed and applied by the court below, is repugnant to the Federal Constitution and to R. S. 5219.

8. The question is of general public importance.

ARGUMENT.

I.

States have no power to tax national banks except in the manner and to the extent authorized by Congress. The Congressional Grant of Authority, R. S. 5219, does not authorize State taxation of any property of national banks except their "Real Property".

It is implicit in the Federal system of government erected by the Constitution, with its structure of dual sovereignties, that neither sovereign may impose a tax burden upon the other, or upon the governmental agencies of the other, without the latter's consent. National banks are fiscal agencies of the Federal Government, and are indispensable to the fiscal operations of that Government.

It follows that the States are without power to impose any tax burden upon national banks without the consent of the Congress. That consent is found in R. S. 5219, which is "the measure of the power of a State to tax national banks, their property or their franchises." It does not authorize a State tax upon any property of national banks except their "real property."[5]

II.

The determinative question is: What did Congress mean by the phrase "Real Property", as used in R. S. 5219? Upon

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[5] *Owensboro Nat'l Bank* v. *Owensboro,* 173 U. S. 664, 669; *Bank of California* v. *Richardson,* 248 U. S. 476, 482-3; *Des Moines Nat'l Bank* v. *Fairweather,* 263 U. S. 103, 106.

this question, statutory definitions in State statutes are incompetent and immaterial.

The California Legislature may, by statutory definition, attach any meaning which it chooses to such terms as "real property", "improvements," "fixtures", etc., as used in its own statutes. But it has no power by so doing to limit or to extend the effect of an Act of Congress. It is clear that Congress intended to establish a general rule for the taxation of national banks which should be uniform throughout the nation—not forty-eight diverse rules, each dependent upon the whim of a State legislature.

Where, as here, the question relates to the meaning of words used in an Act of Congress, definitions thereof in State statutes are utterly incompetent and immaterial.[6]

The court below, in violation of this rule, accepted as controlling herein the statutory definitions in the California statutes (R. 156-157). Basing its decision upon those statutory definitions (and ignoring the question of the intent of Congress), it held as a matter of law that the banking equipment in question is real property for purposes of taxation. This was in the face of the fact that the trial court (whose exclusive province it is to determine issues of fact) found as a fact from the evidence that said equipment is personal property for purposes of taxation (R. 24).

The uncontradicted evidence as to the vault doors[7] is as follows:

Vault doors are manufactured according to stock patterns and are sold, as a unit, with enclosing door frame. They are purposely designed so that they may be installed, removed and re-installed in a new location at minimum ex-

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[6] *Morgan* v. *Commissioner*, 309 U. S. —, 84 L. Ed. 369, 370; *Burnett* v. *Harmel*, 287 U. S. 103; *Lyeth* v. *Hoey*, 305 U. S. 188, 194; *Burk-Waggoner Oil Assn.* v. *Hopkins*, 269 U. S. 110.

[7] It was stipulated that the finding as to vault doors should govern as to the other equipment (R. 30-31).

pense and without injury to the vault or building. The frame is fitted with removable flanges which are wedged in place and grouted into the concrete of the adjacent walls with a small quantity of cement. All that is required to remove it is to "knock out that concrete wedge that is in there" and then the entire door assembly can be taken out without injury to the vault or the building (R. 75, 77-78).

It is common practice to remove and re-install a vault door in new locations many times before it finally goes to the scrap pile. Especially so in California, where the branch-banking system obtains, and the process of opening new branches and moving or discontinuing existing branches (because of constantly changing local business conditions) is practically continuous. So common is this practice that there are independent contractors whose regular business is installing, servicing, removing and re-installing vault doors (R. 72, 83). At least one California bank maintains warehouses for the storage of vault doors and other banking equipment which has been installed and later removed and is awaiting re-installation in some new location (R. 95).

It is thus apparent that the court below held as a matter of law that the California statutory definitions are competent conclusively to impress the status of real property upon these articles of banking equipment, regardless of the fact as to whether they actually are real, personal, mixed or indeterminate in character; and regardless of the fact as to whether they are permanently affixed (without the intention or the right of removal) and therefore real property, or whether they are affixed impermanently (with both the intention and the right of removal) and therefore personal property.

III.

Other Congressional enactments in pari materia with R. S. 5219, and contemporaneous with the re-enactments thereof, show that Congress did not intend that the phrase "Real Property", as used therein, should include such articles of banking equipment as are involved herein.

Every time the Congress have legislated upon the subject of bank-owned property they placed the bank building in one category and grouped the vaults, permanent equipment, furnishings and fixtures together in a separate category, as being separate and distinct from the real property. Some of these enactments, classifying vaults and other bank fixtures and equipment with furnishings, as personal property, were practically simultaneous with the re-enactments of R. S. 5219.

R. S. 5219 was re-enacted March 4, 1923 (42 Stat. 1499). Three weeks prior thereto (February 6, 1923) Congress had amended another statute limiting the amount which a Federal reserve bank may expend upon a branch bank, and placing the limitation upon "the cost of the building proper, exclusive of the cost of the vaults, permanent equipment, furnishings and fixtures, * * *" (42 Stat. 1223, 12 U. S. C. 522). These two measures were pending simultaneously and must have been considered by the Committees on Banking and Currency of the House and of the Senate, respectively, at practically the same time, if not indeed on the same days.

Congress again revised R. S. 5219, March 25, 1926 (44 Stat. 223), and three weeks thereafter (April 14, 1926) enacted a joint resolution authorizing a Detroit Branch for the Federal Reserve Bank of Chicago, and placing a limit upon the cost of the "building exclusive of the cost of the

vaults, permanent equipment, furnishings and fixtures * * *" (44 Stat. 253).

Three days later (April 17, 1926) they enacted a joint resolution authorizing a branch bank at Baltimore, with the proviso that "the amount actually to be expended in the construction of said building and the amount actually to be expended for the vaults, permanent equipment, furnishings and fixtures for said building shall be subject to the approval of the Federal Reserve Board" (44 Stat. 302).

And again April 14, 1930, in authorizing a branch bank at Pittsburgh, Congress added a proviso limiting the cost of the "building exclusive of the cost of the vaults, permanent equipment, furnishings and fixtures for said building * * *" (46 Stat. 166).

> "Statutes *in pari materia*, that is, those which relate to the same matter or subject [in this case, bank-owned property], although some may be special and some general, in the event one of them is ambiguous or uncertain, are to be construed together, even if the various statutes have not been enacted simultaneously, and do not refer to each other expressly, * * *.
>
> "Moreover, this rule is especially applicable where the several statutes are not only *in pari materia* but have been enacted on the same day, or during the same legislative session." Crawford, Statutory Construction, §231, pp. 431-435.

Accord:

Richardson v. *Harmon*, 222 U. S. 96, 103;
Hamilton v. *Rathbone*, 175 U. S. 414, 419, 421.

The court below violated this rule and gave no effect to the Congressional acts, cited *supra*, which were enacted at the same sessions with the re-enactments of R. S. 5219, and are in *pari materia* therewith.

IV.

Congress, in re-enacting R. S. 5219, adopted the construction of the phrase "Real Property" which had been placed thereon by the executive department, as not including banking fixtures or equipment.

It is believed that this Court will take judicial notice (as a matter of general common knowledge) that it has been for many years the practice of the Comptroller of the Currency, from time to time, to call upon the national banks to return a detailed report of their financial condition as of a prescribed date. These returns must be made upon printed forms supplied by the Comptroller which must not be deviated from. Item 6 of this printed form is as follows:

> "6. Bank premises owned $——, furnishings and fixtures $——."

An illustrative sample of these forms (which thus classify banking fixtures as personal property) was introduced in evidence below (R. 121-122) as Plaintiffs' Exhibit 7.[8]

The practical construction given by the Executive Department charged with its administration to an act of Congress which is susceptible of different constructions is entitled to great respect, and, if acted upon for a number of years, will not be disturbed except for cogent reasons. Such construction is not to be overturned unless it is clearly wrong, or unless a different construction is plainly required.[9]

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[8] The original exhibits are in the custody of the court below and will be forwarded for filing with this petition. It may be that this was "Item 7", instead of "Item 6".

[9] *United States* v. *Jackson*, 280 U. S. 183, 193; *McLaren* v. *Fleischer*, 256 U. S. 477, 481.

When a statute which has received such practical construction is re-enacted with the same language the result thereof is the adoption of that construction.[10]

> "* * * when Congress has spoken at best with ambiguous silence—a long continued practice pursued with the knowledge of the Comptroller of the Currency is more persuasive than considerations of abstract conflict between such a practice and purposes attributed to Congress. * * * Even constitutional power, when the text is doubtful, may be established by usage." *Inland Waterways Corp.* v. *Young*, 309 U. S. ——, 84 L. Ed. 628, 632.

The court below refused to apply this rule in the instant case. (See pp. 7-8, *supra.*)

V.

R. S. 5219, being a grant from the sovereign of power or authority should have been construed strictly against the grantee and in favor of the grantor.

R. S. 5219 is a grant from the sovereign to the several States of the power or authority to impose certain limited tax burdens upon its agencies, the national banks. Among other things, it authorizes the States to tax their "real property."

It is settled law that the phrase "real property", in this connection should be construed strictly against the States and in favor of the United States.[11]

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[10] Crawford, Statutory Construction, § 233, pp. 437-439; *United States* v. *Falk*, 204 U. S. 143, 152.

[11] *Coosaw Mining Co.* v. *State of South Carolina*, 144 U. S. 550, 562; *Stein* v. *Bienville Water Supply Co.*, 141 U. S. 67, 80, 81; *Chenango Bridge Co.* v. *Binghamton Bridge Co.*, 70 U. S. (3 Wall.), 51, 75.

This rule applies with equal force when the grantee of the authority or privilege is a State or political subdivision thereof. *Detroit, etc., Co.* v. *Detroit Railway*, 171 U. S. 48, 53.

The court below not only ignored this rule but attempted to reverse it. Instead of construing this grant strictly against the grantee, they construed it with utmost liberality in the grantee's favor.

VI.

R. S. 5219, being a grant of authority to impose State taxes upon national banks in invitum, should have been construed strictly against the State and liberally in favor of the taxpayer.

It is settled law that if there is any uncertainty as to the meaning of a taxing statute it must be construed strictly against the State and liberally in favor of the taxpayer.[12]

The application of this rule in the instant case leads inevitably to the conclusion that Congress, in authorizing the State to tax the real property of national banks, did not intend to subject their banking fixtures and equipment to State taxation. Where, as here, chattels which form no structural part of a building have been affixed thereto by means of bolts, screws or a handful of cement, so that they may be readily removed without injury to the building, the natural inference is that they were not intended to become permanently a part of the building. If it had been so intended, it is natural to expect that they would have been constructed as a part of the building in the first place.

The status of such "articles affixed" (as to whether they should be classified as real or personal property) has long been a subject of doubt and confusion in the law. As the

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[12] *United States* v. *Merriam*, 263 U. S. 179, 187, 188; *Hecht* v. *Malley*, 265 U. S. 144, 156; *Gould* v. *Gould*, 245 U. S. 151, 153; *Crooks* v. *Harrelson*, 282 U. S. 55, 61.

Iowa Supreme Court pointed out in *Ottumwa Woolen Mill* v. *Hawley* (44 Ia. 57, 60, 24 Am. Rep. 719, 721):

> "Fixtures are a species of property which are the dividing line between real and personal property, and to decide on which side of the line certain property belongs is often a vexatious question."

This, therefore, is a situation which calls for the application of the rules of statutory construction. Each of those rules, discussed under headings numbered respectively III, IV, V, and VI, *supra*, leads independently to the same conclusion, to wit, the phrase "real property," as used in R. S. 5219, was not intended to include banking fixtures of the sort involved herein. When the four settled rules of construction all lead directly and independently to the same conclusion, that conclusion should be irresistible. But the court below disregarded all four rules in order to adopt the opposite conclusion.

VI-A.

Apart from the rules of strict construction, the banking fixtures involved herein are personal property under the common law rules governing trade fixtures.

The major portion of the banking fixtures herein involved was installed by the respective banks as tenants of leased premises for the purpose of conducting their business and with the right to remove the same. This is the fact in the case of petitioner Klicka (see *supra*, p. 6). It is also the fact in the case of petitioner United States National Bank (R. 3, 16, 17, 18, and 26). It is also the fact in the case of petitioner First National Trust & Savings Bank (R. 79, 80, 82, 83).

For upwards of a century, this Court has adhered to the rule that trade fixtures installed by a tenant for the carry-

ing on of his business are removable by him and are deemed to be personal property.[13]

In the case of *Bee Building Co.* v. *Daniel* (C. C. A. 8th), 57 F. (2d) 59, the principal question involved was whether banking fixtures identical in kind with those involved herein [14] were real or personal property, and the court held that they were personal property and belonged to the tenant.

And where, as here, the question of the power of the State to tax such fixtures as real property under the limitations of R. S. 5219 has arisen in the Federal courts, they have held such fixtures, when owned and used in their business by national banks, to be exempt from taxation.[15]

Prior to its decision below in the present case, the California Supreme Court held likewise.[16]

---

[13] "Upon principles of public policy, and to encourage trade and manufactures, fixtures which were erected to carry on such business were allowed to be removed by the tenant during his term, and were deemed personalty for many other purposes." *Van Ness* v. *Pacard*, 2 Pet. 137, 143, 144.

"As between landlord and tenant, or one in temporary possession of lands under any agreement whatever for the use of the same, the law is extremely indulgent to the latter with respect to the fixtures annexed for a purpose connected with such temporary possession. * * * Indeed, it is difficult to conceive that any fixture, however solid, permanent and closely attached to the realty, placed there for the mere purposes of trade, may not be removed at the end of the term." *Wiggins Ferry Co.* v. *O. & M. Ry.*, 142 U. S. 396, 415, 416.

[14] They included: "Cages constructed of steel, bronze and marble; the marble railing, the wood and glass partitions * * *, the bronze grill and door, * * * the steel time lock vault door * * *; the two steel vault doors with time lock equipment * * *, together with the steel lining grill * * *, the mahogany booths * * *, all electric fixtures * * *, the exhaust ventilating fan * * *."

Accord: *Chatham Gold Dredging Co.* v. *Burns* (C. C. A. 9th), 84 F. (2d) 717, 720; *Kleinschmidt* v. *Brown* (D. C. E. D. Ark.), 28 Fed. Supp. 86.

[15] *San Francisco* v. *Crocker Woolworth National Bank* (C. C. N. D. Cal.), 92 Fed. 273; *Bank of California* v. *King County* (D. C. W. D. Wash.), 16 Fed. Supp. 976.

[16] *People* v. *National Bank of D. O. Mills & Co.*, 123 Cal. 53, 61; *First National Bank* v. *San Francisco*, 129 Cal. 96, 97.

Accord: *National Bank of Arizona* v. *Long* (Supreme Court, Arizona), 57 Pac. 639, 640.

VII.

The California Tax Statute, as construed and applied by the court below, is repugnant to the Federal Constitution and to R. S. 5219.

As construed and applied by the court below, the California Bank and Corporation Franchise Tax Act (p. 5, *supra*) authorizes and requires the direct taxation of the banking equipment involved herein, regardless of the fact as to whether it is in fact or in law real or personal property.

As so construed and applied, it is submitted that for each of the reasons discussed *supra*, it is repugnant both to the Constitution and to R. S. 5219.

California taxes the income of banks at double the rate imposed on other corporations (8% and 4%).[17] The additional four per cent imposed upon banks is supposed to equal the personal property tax imposed upon other corporations, from which the banks are exempt. In fact it is greater. But, whether greater or less, the fact remains that, if the decision below should stand, banks will be required to pay two taxes on account of their personal property, while other corporations pay but one. This is a denial

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[17] Bank and Corporation Franchise Tax Act, §§ 4(3), 4a.

"(3) With the exception of financial corporations, every corporation doing business within the limits of this state * * * shall annually pay to the state, for the privilege of exercising its corporate franchises within this state, a tax according to or measured by its net income * * * at the rate of four per centum upon the basis of its net income * * *."

* * * (Calif. Stat. 1937, p. 2324.)

"4a. The rate of tax on national banking associations * * * shall be a percentage equal to the percentage of the total amount of net income, allocable to this state, of every corporation taxable under subdivision (3) of section 4 of this act, * * * required to be paid to this state as franchise taxes according to or measured by such net income, and required to be paid to this state or its political subdivisions as personal property taxes * * *; provided, however, that said rate of tax shall not exceed eight per centum." (Calif. Stat. 1935, pp. 962, 1248.)

of the equal protection of the laws, in violation of the Fourteenth Amendment. In the words of the trial judge, "You will still pay your eight per cent in lieu tax and also a real estate tax on the same property" (R. 147).

VIII.

The question is of general public importance.

The question is of importance, not alone to these litigants and not alone to every State in the union, but in the highest degree to the Federal Government.

So far as the States are concerned, it involves the extent and the limitations of their power to impose tax burdens upon national banks, instrumentalities of the Federal Government.

So far as the Federal Government is concerned, it affects vitally the exercise of its constitutional function to borrow money in order to provide for the common defense and the general welfare. The occasion and necessity for the exercise of that function were never so great or so urgent as today. In the performance of that function, the national banks have been and are playing a part, through the purchase of bonds and notes, that is not merely important but almost indispensable. It is essential, therefore, that they be maintained with unimpaired ability to absorb a huge volume of the securities being issued by the Federal Government. Moreover, national banks as fiscal agents of the Federal Government have performed and are daily performing many necessary tasks for the Government.

Earnings of banks from loans have been steadily declining, and with interest rates low, both on loans and investments, it is not easy for banks to maintain their position. Already they are facing increased taxes under the new excess-profits and special defense taxes with no prospect of

additional profits from war preparations, and at the same time they are facing increased expense from the 40-hour per week provision of the Wages and Hours Law which has just become operative.

The additional tax which California is attempting to exact from them is neither negligible nor trifling. It aggregates a large additional sum which must be deducted from net income.

If California, by the mere *fiat* of its legislature, can transform their personal property into real property, and thus subject them to additional State taxation, each of the forty-seven other States can do likewise. How much further they might go, in such event, cannot now be foreseen.

Conclusion.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Supreme Court of the State of California should be granted.

LOUIS W. MYERS,
Counsel for Petitioners.

SANDERS & LA MOTTE,
O'MELVENY & MYERS,
Of Counsel.

November, 1940.

Office - Supreme Court, U. S.
FILED
DEC 31 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 604.

UNITED STATES NATIONAL BANK OF SAN DIEGO, a National Banking Association, FIRST NATIONAL TRUST & SAVINGS BANK OF SAN DIEGO, a National Banking Association, and EMIL KLICKA,

Petitioners,

vs.

COUNTY OF SAN DIEGO, a Quasi Municipal Corporation, and CROWELL D. EDDY, as Assessor of San Diego County.

PETITIONERS' REPLY BRIEF ON PETITION FOR CERTIORARI.

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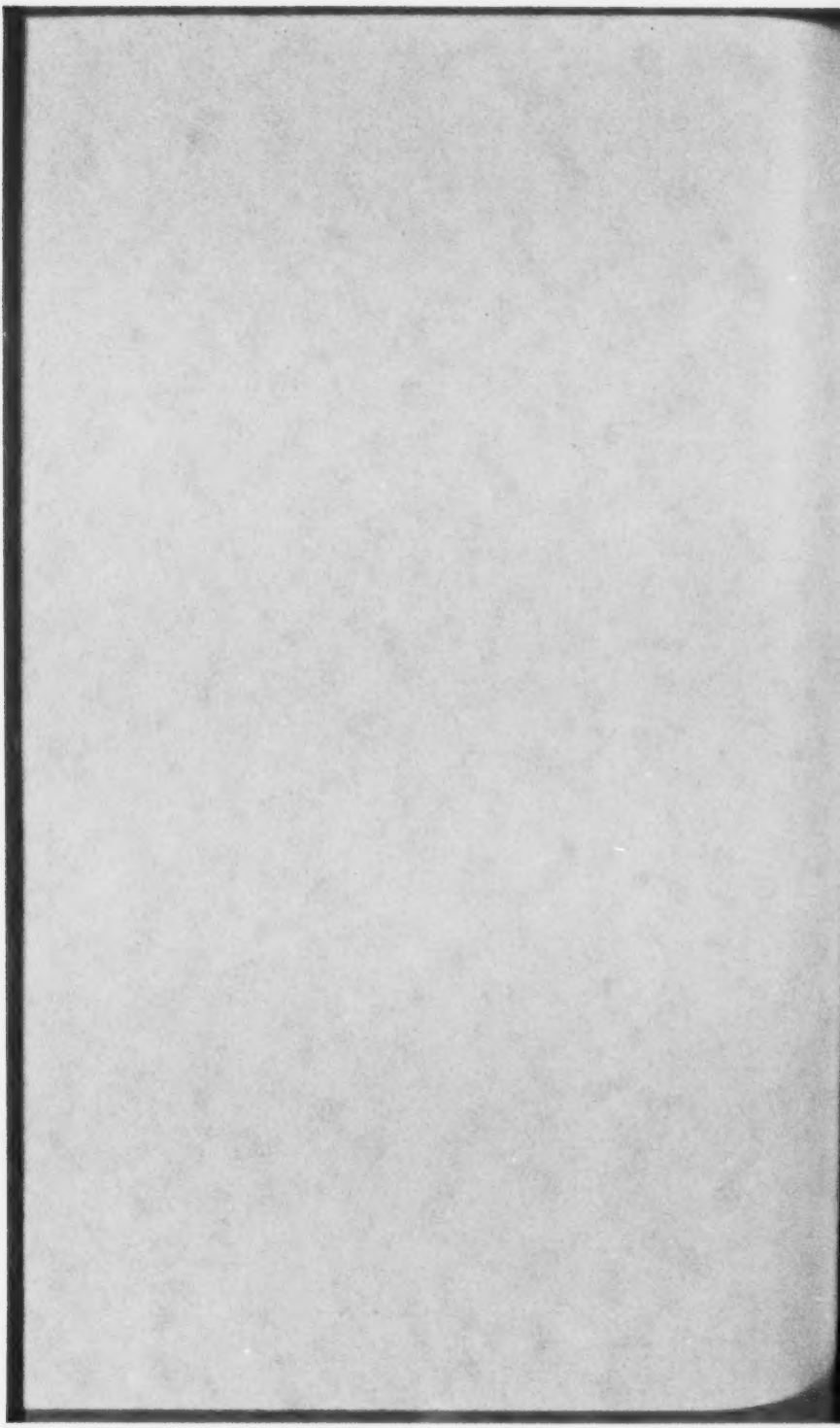

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PETITIONERS' REPLY BRIEF ON PETITION FOR CERTIORARI.

May It Please the Court:

Petitioners respectfully ask leave to submit this brief in reply to respondents' brief in opposition to the petition for a writ of certiorari.

The Federal Questions Were Properly Raised and Expressly Preserved in the State Court.

The federal questions were not merely raised in the state court. They were expressly entertained, considered, discussed, and decided by that Court adversely to peti-

tioners' claims of immunity under the Constitution and laws of the United States.

> "Where the state court does not decide against a petitioner or appellant upon an independent state ground, but deeming the federal question to be before it, actually entertains and decides that question adversely to the federal right asserted, this Court has jurisdiction to review the judgment if, as here, it is a final judgment."
>
> *Indiana ex rel. Anderson v. Brand*, 303 U. S. 95, 98.

That is precisely what the state court did in the instant case. [R. 161, 162.]

Respondents concede (p. 4) that the "second question" ("the unconstitutionality of the Bank and Corporation Franchise Tax Act," as construed and applied herein, for the first time) was raised in the original complaint by the allegation that direct taxation of the banking equipment would constitute double taxation. [R. 3.] But they say that this allegation is ambiguous, in that it may refer to the prohibition against double taxation in the California Constitution or the Political Code. It could not so refer, because there is no such prohibition in the California Constitution or in the Political Code, except in situations which are wholly irrelevant to the case at bar. The pertinent and controlling provisions of the California Constitution are set forth in the petition herein at pages 4 and 5. The provision in Political Code, section 3607, referred to by respondents, is as follows:

> "* * * but nothing *in this code* shall be construed to require or permit double taxation." (Cal. Stat. 1921, p. 184. Italics supplied.)

The Bank and Corporation Franchise Tax Act is not contained in the Political Code or in any code.

Said "second question" is an inherent corollary of the "first question" (the immunity from local taxation of the banking equipment of national banks). When that immunity is established, the inevitable sequence is that the California statute, as construed and applied below, is constitutionally invalid. In a situation identically analogous, this Court said:

> "As the statute was held valid after the conclusion of the Supreme Court of Colorado that the manner of state taxation of national banks must accord with Rev. Stat. 5219, 12 U. S. C. A. §548, and must not interfere with federal functions, it seems clear that the federal question as to the validity of the statute as tested by the Constitution and laws of the United States was necessarily involved and decided. This gives this Court jurisdiction of the appeal."
>
> *Colorado National Bank v. Bedford,* 310 U. S. 41, 47.

It follows that the state court entertained and decided both federal questions adversely to petitioners' contentions.

Respondents' assertion (p. 5) that "there was no real contest at any stage of the case on such federal point" is not supported by the record and does not accord with the fact. Likewise, their suggestion that "plaintiffs had raised the point, but failed to cite any authorities in support, thus constituting a waiver." The opinion of the state court refers to "the cases cited by defendants [obviously, by plaintiffs] as determining that furniture and other personal assets are exempt from state taxation * * *." [R. 161.]

The fact that the federal questions were discussed in both the prevailing and the dissenting opinions is proof that they had not been "abandoned" by petitioners.

The Decision of the State Court Does Not Rest Upon Adequate State Grounds.

Petitioners concede that if the decision below could be sustained upon grounds of state law, this Court should not take jurisdiction. But that is not this case. Petitioners claimed immunity under the Constitution and laws of the United States from local taxation. If that claim was valid, it entitled petitioners to an affirmance of the judgment of the trial court in their favor. In order to reverse that judgment, the California Supreme Court was obliged to do just what it did,—namely, to consider and deny petitioners' claim of federal immunity.

Respondents' assertion (pp. 7, 8) that "the determination as to what constitutes property * * * is altogether a matter of state law and is binding upon this Court," would be true if we were concerned herein with questions solely of the law of the state. But the controlling question herein is what did Congress mean by the phrase "real property" as used in R. S. 5219. That is a question upon which this Court speaks the last word.

Respondents' assertion (p. 9) that some of the vault doors (owned for the most part by the state bank co-plaintiffs who are not petitioners herein) are in premises that are owned, not leased, is sheer "smoke screen". The fact remains that the vault doors and other equipment owned by the national bank petitioners are in leased premises and that said petitioners have the right to remove them. It is also the fact that the vault doors and other equipment installed in the premises owned by petitioner Klicka are owned by the Bank of America, as lessee, with the right to remove same, and that a tax thereon will be a lien upon Klicka's real property. (See Petitioners' Opening Brief, pp. 6, 22.)

The Importance of the Federal Question.

As pointed out in petitioners' opening brief (pp. 25, 26), the question of the power of each of the forty-eight states to impose burdens of direct taxation upon all the national banks within its borders, is of real importance, not only to the banks and to the states, but to the Federal Government, which uses and needs to use the banks in its fiscal operations. The question is in fact much broader in its application than this. There are many other agencies of the Federal Government whose liability to state taxation will be determined by the decision of this question. There are, at the present time, more than thirty federal corporations which have been created to serve as agencies of the Government. (U. S. Government Manual, Index, pp. XI, XII.) As a rule, Congress has provided for each of those agencies, the same exemption from state taxation which is accorded to the national banks, namely, they are exempted from all state taxation, except taxes upon their "real property."[1] Some of those federal corporations have agencies and offices in every state of the Union. The Home Owners' Loan Corporation, for example, has approximately one hundred fifty such offices. (U. S. Government Manual, pp. 414, 415.) Those offices are, for the most part, equipped with fixtures and equipment substantially identical in character with the banking equipment which is involved herein (vaults, vault doors, counters, grills, cabinets, shelving, heating units, ventilating units, etc.). The decision of this case will determine whether or not all such equipment owned by federal agen-

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[1]For example: Home Owners' Loan Corporation, 12 U. S. C. A., §1463(c); Federal Home Loan Banks, 12 U. S. C. A., §1433; Federal Farm Mortgage Corporation, 12 U. S. C. A., §1020(f); Federal Deposit Insurance Corporation, 12 U. S. C. A., §264(p); etc., etc.

cies throughout the United States may be subjected to direct taxation by the several states. It is submitted that this is a question of general public importance.

Respondents' suggestion (pp. 10, 11), that petitioners (plaintiffs) stipulated away their entire case on the first morning of the trial in the court of first instance, comes too late to be taken seriously. It is made now for the first time, after nearly three years of bitterly contested litigation through three courts.

It is respectfully submitted that the public interest will be served by granting the petition in order to determine and settle the question of the extent of the power of the several states to impose burdens of direct taxation upon the agencies of the Federal Government.

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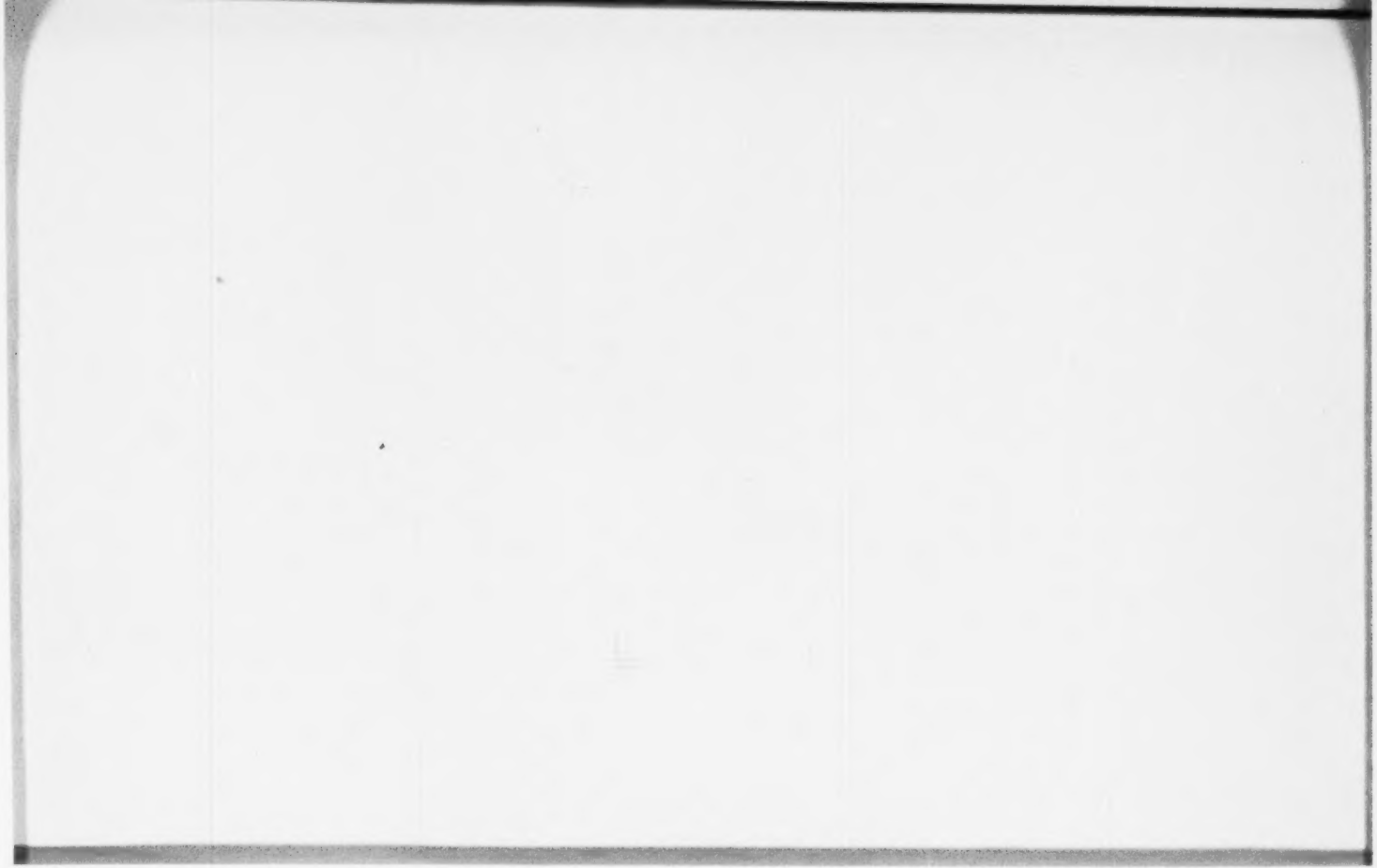
December, 1940.



Office - Supreme Court, U. S.
FILED
JAN 2 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 604

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Petitioners,

vs.

COUNTY OF SAN DIEGO, A QUASI MUNICIPAL CORPORATION, AND CROWELL D. EDDY, AS ASSESSOR OF SAN DIEGO COUNTY,

Respondents.

BRIEF IN OPPOSITION TO

PETITION AND SUPPORTING BRIEF FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1940

No. 604

UNITED STATES NATIONAL BANK OF SAN DIEGO, A NATIONAL BANKING ASSOCIATION, FIRST NATIONAL TRUST & SAVINGS BANK OF SAN DIEGO, A NATIONAL BANKING ASSOCIATION, AND EMIL KLICKA,

Petitioners,

vs.

COUNTY OF SAN DIEGO, A QUASI MUNICIPAL CORPORATION, AND CROWELL D. EDDY, AS ASSESSOR OF SAN DIEGO COUNTY,

Respondents.

BRIEF IN OPPOSITION

TO

PETITION AND SUPPORTING BRIEF FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Come now the Respondents, County of San Diego, and Crowell D. Eddy, as Assessor of San Diego County, and present the following statement making against the jurisdiction of the above-entitled Court and in opposition to the Petition and supporting Brief of Petitioners filed pursuant to Supreme Court Rule No. 38.

Statement

Petitioners' statement of the statutes involved (Pgs. 4-5 their Brief) fails to include the statutes

upon which the decision of the state Court rests (R. 157), namely, Title IX, Part III of the Political Code, particularly Section 3617 thereof, and Sections 658 and 660 of the Civil Code. Section 3617 of the Political Code incorporates for taxation purposes the definitions of "real property" and "fixtures" as defined in Sections 658 and 660 of the Civil Code. *City of Pasadena vs. County of Los Angeles,* 182 Cal. 171; *Southern California Telephone Company vs. State Board of Equalization,* 12 Cal. 2d 127. And Sections 658 and 660 of the Civil Code are themselves declaratory of the common law. *City of Los Angeles vs. Hughes,* 202 Cal. 731. Hence the decision of the state Court declares that bank vault doors are "fixtures" and "real property" for local tax purposes, pursuant to the common law.

Plaintiff Emil Klicka and the Bank of America National Trust and Savings Association are erroneously included in the Petition for the Writ. (Pg. 6 Petitioners' Brief). Petitioner Klicka owns a vault (R. 136). Since he is not a national banking association, obviously he cannot raise in this Court alleged federal questions of immunity under R. S. 5219, particularly since he stipulated in the state Court (R. 143) and now concedes here (Pg. 6, Petitioners' Brief) that his vault is real property for tax purposes. Any so-called federal question he seeks to raise is moot. Surrender of the subject matter of the litigation leaves no controversy in respect of the issues relating thereto; *Meyer vs. Pritchard,* 131 U. S. CCIX Append., 23 L. Ed. 961; *Thatcher vs. Rockwell,* 105 U. S. 467, 26 L. Ed. 949. Likewise the Bank of America National Trust and

Savings Association cannot invoke the jurisdiction of this Court, since it was not a party to the record in the Court below (R. 134); *Bayard vs. Lombard,* 9 How. 530, 551, 13 L. Ed. 245, 254. Neither can Petitioners here champion the alleged rights of such third party; *McCabe vs. Atchison,* T. & S. F. R. Co., 235 U. S. 151, 162, 35 S. Ct. 69, 71, 59 L. Ed. 169; *Liberty Warehouse Co. vs. Burley Tobacco Growers' Co-op. Marketing Ass'n.,* 276 U. S. 71, 88, 48 S. Ct. 291, 294, 72 L. Ed. 473; *Henderson vs. Tennessee,* 10 How. 311, 323, 13 L. Ed. 434, 439; *Owings vs. Norwood's Lessee,* 5 Cranch 344, 3 L. Ed. 120; *Miller vs. National Bank of Lancaster,* 106 U. S. 542, 1 S. Ct. 536, 538, 27 L. Ed. 289.

BRIEF

Summary of Argument

1. The federal questions sought to be reviewed were not properly raised or preserved in the state Courts.

2. The decision of the state Court rests upon state grounds which independently and adequately support the judgment.

3. The case presents no substantial federal question.

ARGUMENT

I.

The federal questions sought to be reviewed were not properly raised or preserved in the state courts.

Petitioners seek to raise two federal questions: (1) denial of an immunity from local taxation of certain property owned by them, which immunity is claimed under the federal Constitution and the

federal statute R. S. 5219; and (2) the unconstitutionality of the Bank and Corporation Franchise Tax Act, on the ground that it is repugnant to the federal Constitution, Fourteenth Amendment, equal protection clause thereof, and to R. S. 5219.

As to the second question jurisdiction cannot be invoked since the question is raised for the first time in the petition for the Writ; *Hiawassee River Power Co. vs. Carolina-Tennessee Power Co.*, 252 U. S. 341, 344, 40 S. Ct. 330, 64 L. Ed. 601. The record does not otherwise disclose this question to have been raised in the state Courts, save perhaps by an allegation in the complaint (R. 3) that the local assessment of the vault doors as real property is double taxation. Such allegation is too general and ambiguous to constitute a proper raising of the question, and the supreme court decision does not consider or pass upon it (R. 153-162). Moreover such ambiguous reference may well have been to the prohibition against double taxation contained in the California Constitution (Article XIII, Sec. 1) or a similar prohibition in the Political Code (Sec. 3607). The particular clause in the federal Constitution, or the particular statute relied upon, and the rights claimed thereunder, must unmistakably appear; *Michigan Sugar Co. vs. Michigan,* 185 U. S. 112, 22 S. Ct. 581, 46 L. Ed. 829; *Bowe vs. Scott,* 233 U. S. 658, 664, 665, 34 S. Ct. 769, 58 L. Ed. 1141; *Porter vs. Foley,* 24 How. 415, 16 L. Ed. 740; *Saltonstall vs. Saltonstall,* 276 U. S. 260, 267, 268, 48 S. Ct. 225, 72 L. Ed. 565.

Likewise the first question was not properly raised or preserved in the state Courts. The fact

that the highest Court of the state discussed this question in its opinion (R. 161-162) is not sufficient. It is apparent from the record there was no real contest at any stage of the case on such federal point; *Morrison vs. Watson,* 154 U. S. 111, 115, 14 S. Ct. 995, 38 L. Ed. 927. The gist of the Court's comment in the opinion is that plaintiffs had raised the point, but failed to cite any authorities in support, thus constituting a waiver; *Harding vs. Illinois,* 196 U. S. 78, 84, 88, 25 S. Ct. 176, 49 L. Ed. 394. Moreover, such deficiency in the record is not cured or aided by raising the question in the briefs; *Live Oak Water Users' Ass'n. vs. Railroad Commission of State of California,* 269 U. S. 354, 357, 358, 46 S. Ct. 149, 70 L. Ed. 305; or by oral argument; *Live Oak Water Users' Ass'n vs. Railroad Commission,* supra; or by specific reference thereto in the dissenting opinion; *American Surety Co. vs. Baldwin* 287 U. S. 156, 53 S. Ct. 98, 77 L. Ed. 231, 86 A. L. R. 298; *Baldwin vs. Anderson,* 50 Idaho, 606, 623, 299 P. 341; *Herndon vs. Georgia,* 295 U. S. 441, 55 S. Ct. 794, 79 L. Ed. 1530; *Herndon vs. The State,* 179 Ga. 597, 602, 603, 176 S. E. 620; *York Heating & Ventilating Corporation vs. Malooly,* 296 U. S. 533, 56 S. Ct. 92, 80 L. Ed.—; *Malooly vs. York Heating & Ventilating Corporation,* 270 Mich. 240, 256, 258 N. W. 622. Such references constitute no part of the record for the purpose of determining jurisdiction of this Court. As for the testimony of the witnesses, the trial Court's opinion and the stipulation referred to (Pgs. 9-10 Petitioners' Brief) such matters, while part of the record, fall far short of raising specifically or by intendment the immunity question now urged. These matters relate to several incompetent and ir-

relevant federal statutes, rules, regulations, "constructions", customs and usages which the state Supreme Court has now twice summarily disposed of by final judgments that such classifications have no bearing on the character of the property for purposes of taxation; *Southern California Telephone Co. vs. State Board of Equalization,* supra; R. 162. Rulings by the state Court on such matters are conclusive and will not be made the subject of inquiry; *Grayson vs. Harris,* 267 U. S. 352, 357, 358, 45 S. Ct. 317, 69 L. Ed. 652; *Chicago & Alton R. Co. vs. Wiggins Ferry Co.,* 119 U. S. 615, 622, 623, 7 S. Ct. 398, 30 L. Ed. 519. Where the law is established by repeated and consistent decisions of a state Court, such established rules are regarded by the federal Courts, no less than by the state Courts themselves, as authoritative declarations of what the law is; *Burgess vs. Seligman,* 107 U. S. 20; *Bucher vs. Cheshire Railroad Co.,* 125 U. S. 555; *Quong How Wah Co. vs. Industrial Accident Commission,* 255 U. S. 445.

II.

The decision of the state Court rests upon state grounds which independently and adequately support the judgment.

The law of this case is that the common law rule of fixtures, which is codified in the state tax statute (Sec. 3617 Pol. Code) governs in classifying bank vault doors as real or personal property for the purposes of ad valorem taxation.

The trial court disregarded this mandate, declined to apply the law of fixtures to the evidence, which was without conflict on the question (R.

162), and rested its decision on the erroneous conclusion of law that Sections 61 and 84 of the Bank Act, an unrelated and irrelevant statute, applied in classifying the property for tax purposes (R. 145-146). The appellate Court upheld the trial court in error (Pg. 7, Petitioners' Brief). The Supreme Court on review corrected the error, applied the common law rule of fixtures to the uncontradicted evidence, found the vault doors to be real property for purposes of local taxation, and denied rehearing (R. 153-166). Thus the decision complained of was based on the non-federal ground of the common law, independently of any immunity or right claimed under federal statute R. S. 5219; "There is no federal general law."—*Erie Railroad Co. vs. Tompkins,* 304 U. S. 64. "The common law . . . always is the law of some state."—Holmes J. dissenting in *Southern Pacific Co. vs. Jensen,* 204 U. S. 205, 222. Such independent non-federal ground is broad enough and tenable enough to sustain the judgment, and is therefore adequate; *Ward vs. Board of County Comr's. of Love County, Okla.,* 253 U. S. 17, 22, 23, 40 S. Ct. 419, 64 L. Ed. 751. It is settled that this Court follows the state Court's declaration of its own law, whether common law or statutory; *Hawks vs. Hamill,* 288 U. S. 52, 57, 58; *Oklahoma Packing Co. vs. Oklahoma Gas & Elec. Co.,* 60 S. Ct. 215, 217; *United States vs. Robbins,* 269 U. S. 315; *Freuler vs. Helvering,* 291 U. S. 35. And particularly does this Court follow the common law of California as found and established by the Supreme Court of that state; *Erie Railroad Co. vs. Tompkins,* supra. Moreover, the determination as to what constitutes property and when it becomes

vested is altogether a matter of state law and is binding upon this Court; *Fox River Paper Co. vs. Railroad Comm.,* 274 U. S. 651, 47 S. Ct. 669, 71 L. Ed. 1279; *Talcott vs. United States,* 23 F 2d 897 (certiorari denied, 277 U. S. 604, 48 S. Ct. 601, 72 L. Ed. 1011); *Henggler vs. Allen,* 32 F 2d 69 (certiorari denied, 280 U. S. 594, 50 S. Ct. 40, 74 L. Ed. 642). And whether property is real or personal is to be determined according to state law; *Re Johns Mansville Sales Corporation,* 88 Fed. 2d, 520; *Willis vs. Beeler,* 90 Fed. 2d 538, certiorari denied 302 U. S. 717. Likewise whether property is properly classified as real or personal for taxation purposes is determined by state law; *Ledoux vs. Bee,* 83 Fed. 761, 765; *Savings & Loan Society vs. Multnomah County,* 169 U. S. 421, 18 S. Ct. 392, 42 L. Ed. 803; *Lewis vs. Monson,* 151 U. S. 545, 14 S. Ct. 424, 38 L. Ed. 265; 27 R. C. L. 50, n. 5 and cases cited. Where the decision complained of rests on independent grounds not involving a federal question and broad enough to maintain the judgment, the cause will be dismissed by this Court without considering any federal question that may also have been presented; *Municipal Securities Corp. vs. Kansas City,* 246 U. S. 63, 38 S. Ct. 224, 62 L. Ed. 579; *Bilby vs. Stewart,* 246 U. S. 255, 38 S. Ct. 264, 62 L. Ed. 701; *Dibble vs. Bellingham Bay Land Co.,* 163 U. S. 63, 69, 16 S. Ct. 939, 41 L. Ed. 72; *Eustis vs. Boles,* 150 U. S. 361, 366, 14 S. Ct. 131, 37 L. Ed. 1111; *Klinger vs. Missouri,* 13 Wall. (80 U. S.) 257, 263, 20 L. Ed. 635; *Harrison vs. Morton,* 171 U. S. 38, 47, 18 S. Ct. 742, 43 L. Ed. 63.

In this connection Petitioners urge (Pgs. 22-23 their Brief) that even under the common law rule

of fixtures applied by the state Supreme Court the vault doors are trade fixtures and hence personal property. Aside from the rules above noted that the state Court's determination of this question is conclusive, the point is without merit. In nearly every instance (nineteen of the 22 doors involved) the party installing the vault doors owns the building in which the same were installed (R. 159). There is no separate ownership, no relationship of landlord and tenant existing between the owners of these 19 doors and the owners of the premises to which they are annexed. Both annexed property and premises belong to one and the same person, respectively. Trade fixtures presuppose the relationship of landlord and tenant existing between the owner of the article annexed and the owner of the premises to which the article is annexed. Section 1019 of the Civil Code, the California trade fixture definition and rule, provides:

> A *tenant* may remove from the *demised premises,* any time *during the continuance of his term,* anything affixed thereto for purposes of trade, manufacture, ornament or domestic use, if the removal can be effected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part of the premises.

As to the remaining 3 vault doors, granting they are on leased premises, and that separate ownerships exist, nevertheless it is established that even removable fixtures as well as trade fixtures once annexed constitute real property until severance; *United States vs. Stowell,* 113 U. S. 1, 10 S. Ct. 244,

33 L. Ed. 555; *Kutter vs. Smith,* 69 U. S. (2 Wall) 491, 17 L. Ed. 830; *Freeman vs. Dawson,* 110 U. S. 264, 28 L. Ed. 141; *Winslow vs. Merchants Ins. Co.,* 4 Met. 306; *Bliss vs. Whitney,* 9 Allen 114; *New York Life Ins. Co. vs. Allison,* 107 Fed. 179, cert. denied 181 U. S. 618; *Sampson vs. Camperdown Cotton Mills,* 64 Fed. 939. California follows this rule; *Merritt vs. Judd,* 14 Cal. 15; *Marks vs. Ryan,* 63 Cal. 107; *Earl vs. Kelly,* 21 C. A. 480; *Marker vs. Williams,* 39 C. A. 674; *San Francisco Breweries vs. Schurtz,* 104 Cal. 420; *McNally vs. Connolly,* 70 Cal. 3; *City of Los Angeles vs. Hughes,* 202 Cal, 731; *Bank of America vs. New York Life Insurance Co.,* 16 C. A. 2d 719; *Woods vs. Bank of Haywards,* 10 C. A. 93; see 26 Corpus Juris 697, sec. 83 for other jurisdictions in accord.

III.

The case presents no substantial federal question.

Since the decision complained of was based on independent and adequate non federal grounds, it follows that the case presents no substantial federal question.

However, there are other reasons why no federal question is presented.

Petitioners have stipulated and conceded away the vaults to which the vault doors here involved are annexed. (R. 143, pg. 6 their Brief). Hence there is no "case" or "controversy", no federal question as to them. But the vault doors are an integral part of the vaults. Together the vault and door constitute one vault structure, a unit for use; separated they fail in their intended purpose; both

functionally and physically the vault door is integrated with the vault itself, and thus together they constitute an improvement to the realty and hence real property, says the Supreme Court of this state (R. 159). And this principle is firmly established in California, in tax cases, as well as other cases; *Southern Calif. Tel. Co. vs. State Board of Equalization,* supra; *City of Los Angeles vs. Klinker,* 219 Cal. 198; *Woods vs. Bank of Haywards,* supra; *Bank of America vs. N. Y. L. Ins. Co.,* supra; *Realty Dock etc. Corp. vs. Anderson,* 174 Cal. 672. Consequently the surrender by Petitioners of the entire subject matter of the litigation, namely the vault structures, by stipulation and admission, is fatal and certainly forecloses pursuit of any part of such subject matter further as to possible federal questions involved; *Meyer vs. Pritchard,* supra; *Thatcher vs. Rockwell,* supra.

Moreover, Petitioners adopt the wrong theory concerning the federal statute, R. S. 5219. They persist in construing the act as a *grant* of power to the states to tax the real property of national banks, whereas the proper and established construction of the statute is that it constitutes but a *limitation* on an existing and otherwise plenary power of taxation which the states have always possessed.

Chief Justice Marshall recognized this inherent state right and declared the doctrine early in our national history, before the enactment of R. S. 5219, in the case of *McCulloch vs. Maryland*, 17 U. S. (4 Wheat.) 316, 436, when he said:

"This opinion does not deprive the states of any

> resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution in common with other property of the same description throughout the state."

And Congress in enacting R. S. 5219, has not merely expressly recognized that the right of the state and its political subdivisions to tax real property within the state includes the right to tax the real property of national banks, but by its specific injunction against any construction that could lead to exemption has insured the states against any impairment of that right. Witness the pertinent language of the section:

> "Nothing herein shall be construed to exempt the real property of (national banking) associations from taxation in any state or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed."

To construe such language as a gift of a new power to taxing agencies which always had such power and to conclude therefrom that the grant must be construed strictly against the grantee, and that declaratory state laws enacted in its exercise are irrelevant and immaterial where federal questions of interpretation are involved, is at best an enfeebled construction.

It is a cardinal rule of statutory construction that where terms used in an Act of Congress are not de-

fined, and R. S. 5219 does not define the term "real property" used therein, they are to be given their generally accepted and common law meaning. In *Caminetti vs. U. S.,* 242 U. S. 470, 485-6, the Court declared that:

> "Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them."

In *U. S. vs. San Jacinto Tin Co.,* 125 U. S. 273, 280, the Court held:

> ". . . though it has been said that there is no common law of the United States, it is still quite true that when acts of Congress use words which are familiar in the law of England, they are supposed to be used with reference to their meaning in that law."

In common law jurisdictions fixtures, structures and improvements on the land are universally regarded as real property (61 Corpus Juris p. 188, sec. 149; p. 631, sec. 778).

The statutory provisions of California (Civil Code Sections 658 and 660) under which respondent county assessor classified the vault doors in question as real property and under which the highest Court of the state upheld his assessment, are themselves declaratory of the common law; *City of Los Angeles vs. Hughes,* supra.

Since Sections 658 and 660 of the Civil Code set forth the common law meaning of the term "real property" and since that term in R. S. 5219 must be

given its common law meaning, property like that in question which is real property within the meaning of Civil Code Sections 658 and 660 is likewise real property under R. S. 5219, and there is no federal question here involved.

CONCLUSION

Wherefore, it is submitted that this Court has no jurisdiction in this cause and that any federal question which may be presented is so unsubstantial as to merit no hearing by this Court.

Respectfully submitted,

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End